BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GWENDOLYN M. STUDYVIN	)	
Claimant	)	
VS.	)	
	)	Docket No. 242,200
WAL-MART	)	
Respondent	)	
AND	)	
	)	
INSURANCE COMPANY OF	)	
THE STATE OF PENNSYLVANIA	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the November 29, 2005, Award entered by Administrative Law Judge John D. Clark. The Board heard oral argument on March 17, 2006, in Wichita, Kansas.

APPEARANCES

John S. Seeber of Wichita, Kansas, appeared for claimant. Kendall R. Cunningham of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. In addition, at oral argument before the Board, the parties agreed the record also includes the May 24, 1999, discovery deposition transcripts of Kathy Wilson and Bruce Cowart and the May 19, 1999, discovery deposition transcript of claimant.

ISSUES

In her application for hearing, claimant alleged she injured her hip, back, neck, shoulder and upper extremity while working for respondent. Claimant alleged her injuries occurred on May 13, 1998, and each day she worked through January 28, 1999.

In the November 29, 2005, Award, Judge Clark found claimant injured her back and left arm from May 13, 1998, and each working day through January 28, 1999. The Judge determined those injuries comprised a 21 percent whole person functional impairment. In addition, the Judge found claimant's average weekly wage for purposes of her repetitive-trauma injury was $289.79. Lastly, the Judge found claimant was entitled to receive permanent partial general disability benefits for a 21 percent whole person functional impairment from January 28, 1999, through January 13, 2004, followed by permanent total disability benefits.[1] But in computing the award, the Judge used January 29, 1999, as the last day of the series of trauma and used January 27, 2004, for commencing claimant's permanent total disability benefits.

Respondent and its insurance carrier contend Judge Clark erred. They argue claimant sustained two separate accidental injuries – one to her low back on May 13, 1998, and another to her left upper extremity in a series of repetitive traumas ending January 28, 1999. Further, respondent and its insurance carrier maintain claimant has failed to prove either a permanent total disability or a work disability (a permanent partial general disability greater than the functional impairment rating). With regard to the latter, they submit there is no evidence regarding claimant's task loss and that claimant declined, without justification, respondent's offers of accommodated work.

In summary, respondent and its insurance carrier request the Board to modify the Award and (1) grant claimant permanent disability benefits for a whole person functional impairment between 10 and 15 percent for the low back injury and (2) grant claimant permanent disability benefits for a 19 percent functional impairment to the left upper extremity.

Claimant contends Judge Clark correctly found she sustained a series of micro-traumas to her back and left arm from May 13, 1998, through January 28, 1999, and that she is permanently and totally disabled. But claimant contends her permanent total disability benefits should commence January 29, 1999, rather than January 14, 2004, as determined by the Judge. In addition, claimant contends her average weekly wage should be increased by $34.37, which represents discontinued insurance benefits, to $324.16. Lastly, claimant requests chiropractic treatment for life.

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[1] ALJ Award (Nov. 29, 2005) at 7.

The issues before the Board on this appeal are:

1. Should claimant's low back and left upper extremity injuries be treated as one injury that occurred over a period of time due to repetitive trauma or as two separate accidents – one to her low back on May 13, 1998, and another to her left upper extremity in a series of trauma that ended January 28, 1999?

2. What permanent disability has claimant sustained?

3. What is claimant's average weekly wage?

4. Is claimant entitled to ongoing chiropractic treatment?

FINDINGS OF FACT

After reviewing the record and considering the parties' arguments, the Board finds:

1. Respondent is a discount retailer. Claimant began working for respondent's Derby, Kansas, store in mid-April 1998. Claimant's job duties included unloading trucks, which required her to carry and stack all sorts of merchandise onto pallets. Claimant is certain some of the heavier merchandise weighed over 50 pounds.

2. While working the third shift on May 13, 1998, claimant began experiencing pain in her left hip after twisting while placing an item on a pallet.[2] Claimant told her supervisor that she was hurt bending and turning. The next morning claimant consulted her family doctor, Dr. Thomas. Claimant continued to see the doctor for approximately a week and a half, after which she stopped seeing the doctor because she could not afford the expense. Within days of May 13, 1998, claimant's low back popped when a co-worker accidentally struck her in the side with a box while they were working.

3. Despite ongoing pain, claimant continued working for respondent. In late August 1998, claimant was assigned the job of stocking the stationery department. In that job, claimant took cases of copy paper, notebooks, candles and office supplies and stocked shelves. Some of the heavier items claimant handled in that job were safes, cartons of copy paper, bookcases and filing cabinets. While stocking, claimant would hold boxes with her right hand while filling the shelves with her left hand.

[2] Studyvin Depo. (May 19, 1999) at 39.

4. In addition to her low back and hip complaints, claimant also developed left arm symptoms. Claimant first testified her left arm symptoms began in January 1999.[3] But claimant later testified those symptoms were present in May 1998, when her low back symptoms began.[4] Nevertheless, by January 1999 claimant noticed that at the end of her work shift she would be unable to pick up a ream of paper. In January 1999, claimant also noticed her hip pain was worse. According to claimant, her hip was hurting so much that she was exerting more pressure on her neck and shoulders when she lifted the boxes of merchandise. Eventually, claimant learned from one of her doctors that her hip was fine but it was her low back that was causing her symptoms.

5. In early December 1998, claimant sought medical treatment from a Dr. Bond. And in early February 1999, claimant saw Dr. David Niederee, who restricted her from working. Consequently, the last day that claimant worked for respondent as a stocker was on or about January 28, 1999.

6. Dr. Niederee referred claimant to an orthopedic surgeon, Dr. Robert L. Eyster, for her low back. Dr. Niederee also referred claimant to Dr. Ferris to evaluate her left upper extremity complaints. Tests indicated claimant had a protruding disc between the fifth lumbar and first sacral (L5-S1) vertebrae. And other tests indicated she had carpal tunnel syndrome in her left wrist and ulnar nerve entrapment in her left elbow.

7. In June 1999, claimant underwent both carpal tunnel release surgery on her left wrist and ulnar nerve release surgery on her left elbow. In August 1999, after recovering from her left arm surgery, claimant returned to work for respondent as a greeter. But claimant's back symptoms continued to trouble her and she again left work for additional low back treatment. In late March 2000, Dr. Eyster performed a partial discectomy and fused her L5-S1 vertebrae. In July 2000, after recovering from the low back surgery, claimant returned to work for respondent. This time claimant began as a greeter and eventually became a cashier on the evening shift.

8. On May 18, 2001, claimant last saw Dr. Eyster. The doctor raised claimant's single-lifting restriction to 30 pounds and her repetitive-lifting restriction to 10 pounds. The doctor further restricted claimant from excessive bending and twisting, and recommended that claimant sit as needed. Nonetheless, Dr. Eyster believed claimant could perform her job as a cashier. At that point the doctor felt claimant

[3] P.H. Trans. (May 20, 1999) at 26.

[4] Continuation of R.H. by Depo. at 6.

was at maximum medical improvement and he rated her whole person functional impairment at 12 percent under the AMA *Guides*[5] (4th ed.).

9. Claimant worked for respondent until the latter part of May 2002, when she was terminated for attendance problems. From approximately Thanksgiving of 2001 through her termination, claimant worked as a cashier, which she now contends violated her medical restrictions against bending and lifting. She also now contends respondent would not let her sit as needed. Claimant believes her attendance problems were caused by her work-related injuries.

10. After leaving respondent's employ, claimant initially drew unemployment benefits. But on October 29, 2002, she began working part-time for the United States Postal Service entering information from envelopes that machines could not read. Claimant was guaranteed two hours a day. When she began she worked four hours a day, five days a week. That schedule lasted until the summer of 2003 when claimant was reduced to only one day a week until sometime in December 2003, when she was increased to three days a week due to Christmas. Claimant testified she had difficulty performing that work as she could not tolerate sitting, which caused headaches and problems with her neck and arms.[6] Claimant's job with the United States Postal Service ended approximately January 31, 2004, when claimant's contract was not renewed. Claimant testified her contract was not renewed because her neck and left arm prevented her from working at the required pace.

11. At the Judge's request, claimant was seen by Dr. Robert A. Rawcliffe, Jr. The doctor examined claimant in June 2003 and concluded that her complaints and findings were far out of proportion to her objective findings and that she had considerable symptom magnification. The doctor also concluded claimant was suffering from depression and that she should see a psychologist or psychiatrist. In his June 23, 2003, report, the doctor indicated claimant had an 11 percent whole person functional impairment due to her left upper extremity injury and a 10 percent whole person impairment due to her back injury, which combined to yield a 21 percent whole person impairment under the AMA *Guides*.

12. Dr. Rawcliffe also indicated in his initial report that claimant should be restricted to very light sedentary work with occasional lifting above 20 pounds and frequent lifting limited to 10 pounds. But after receiving further inquiry from claimant's attorney, the

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[5] American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

[6] R.H. Trans. at 13.

doctor added that he believed claimant was probably unable to work as a sedentary occupation would most likely entail using a typewriter or computer, which would be precluded by claimant's left arm problems. The doctor wrote, in part:

> As we discussed over the telephone today, in response to your question, I offered the opinion within a reasonable degree of medical certainty that Gwendolyn Studyvin is most likely not able to be gainfully employed due to a combination of problems related to her lumbar spine surgery and her carpal tunnel release and release of the ulnar nerve at the elbow. As I stated in my original report, she would be restricted to very light duty work, primarily because of the lumbar spine surgery, and basically could only do a sedentary type of occupation.
>
> However, a sedentary type of occupation would most likely be using a typewriter or computer and this would be precluded by her problems with the carpal tunnel release and the ulnar nerve release at the elbow.[7]

13. On December 22, 2003, respondent offered claimant accommodated work as a greeter. This job was somewhat different and physically easier than the earlier greeter job she had performed as it did not require separating entangled shopping carts, which claimant believed had aggravated the symptoms in her low back and arms. The letter from respondent and its insurance carrier's attorney reads, in part:

> The purpose of this correspondence is to confirm that Wal-Mart is offering your client a position at the store where she previously worked.
>
> Your client is to report to Wal-Mart Store 592, in Derby, Kansas, on **Monday, December 29, 2003, at 8:00 a.m.** She is to speak with Mr. Chris Sexton, or the manager in charge, who will take care of all the necessary paperwork to re-establish her position with Wal-Mart. She will be employed within the permanent limitations that have been assigned by Dr. Rawcliffe. She will be allowed to change positions as necessary to the extent required.
>
> If your client does not appear at the designated date and time, we will consider that she has refused this offer of accommodated work. This job will be as a greeter at the Derby Wal-Mart, but your client will be specifically relieved of any duties as it

[7] Rawcliffe Depo., Ex. 2.

> pertains to the separation of entangled shopping carts, or the lifting of anything which she feels is in violation of her restrictions.[8]

14. Claimant declined the job offer. Claimant's attorney responded that the offer was not made in good faith as respondent had previously ignored claimant's medical restrictions and, besides, Dr. Rawcliffe had indicated claimant was restricted to sedentary activities and that she was not able to be gainfully employed.[9] Nonetheless, respondent and its insurance carrier's attorney wrote claimant's attorney on December 29, 2003, and advised that respondent was confident it could accommodate Dr. Rawcliffe's restrictions and asked claimant to meet with the store manager to discuss the job and her specific concerns. Claimant's attorney responded by stating the offer was a sham and that this was a "permanent total disability case."[10]

15. On August 1, 2005, respondent again offered claimant an accommodated greeter position. The letter from respondent and its insurance carrier's attorney reads, in part:

> Please find attached hereto correspondence from the store manager of the Derby Wal-Mart Store No. 592 referencing an offer of accommodated work for your client. As you are aware, Dr. Stein was the Court-ordered independent medical examiner, who ultimately opined that your client should have restrictions as outlined in the attached medical record. This job is to take those restrictions into account, and will return your client to comparable wages.[11]

Claimant did not accept the job offer from respondent. Claimant's attorney responded that the offer was in bad faith and that it was a sham.

16. Claimant has not worked since leaving the United States Postal Service in late January 2004. After the United States Postal Service job ended claimant did not apply for unemployment benefits. But she had applied for Social Security disability benefits in the fall of 2003. As of her August 2005 deposition, claimant had not looked for any other job following approximately February 2004. And in April 2005,

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[8] R.H. Trans., Cl. Ex. 1.

[9] *Id.*, Cl. Ex. 2.

[10] *Id.*, Cl. Ex. 4.

[11] Studyvin Depo. (Aug. 4, 2005), Ex. 2.

claimant received a favorable decision that she was entitled to receive Social Security disability benefits.

17. Dr. Rawcliffe has not seen claimant since June 2003. Nonetheless, he testified in late July 2004 that claimant probably would be unable to perform the greeter job, which respondent had offered claimant, eight hours a day, five days a week, despite the fact that it did not violate his medical restrictions.

> Q. (Mr. Cunningham) If that job fell within your restrictions, why would she not be able to do that?
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> A. (Dr. Rawcliffe) I think eight hours a day, considering the way she is, whether it is psychological or physical, she just wouldn't be able to do it. As I said, I can't sort out how much of this is physical and how much of it is psychological. But if you were to ask what I would expect would happen if you sent her back to work eight hours a day, I would predict that she would have much worse symptoms and probably wouldn't last more than a day or two. Now, whether that's mostly psychological or at least in part physical, as I have explained, I really can't separate those two.[12]

As indicated above, Dr. Rawcliffe felt claimant should see a psychologist or psychiatrist. The doctor thought claimant needed an accurate diagnosis regarding her depression, followed by appropriate treatment.

18. Dr. Chad A. Cohoon, a chiropractor that claimant has seen rather consistently since 1999, testified that he believed claimant was unemployable. He and claimant have discussed on several occasions what claimant would be able to do and he does not feel claimant could sit or stand for any prolonged period of time or do any type of prolonged typing, for example. The doctor thinks the combination of the low back and upper extremity injuries makes it very difficult for claimant to be gainfully employed.

19. Dr. Paul S. Stein saw claimant at the Judge's request to determine if she might benefit from another fusion in her low back. The doctor examined claimant in March 2005 and concluded claimant had a 20 percent whole person functional impairment due to her low back injury but five percent preexisted the injury she sustained working for respondent. The doctor testified that claimant's impairment fell within DRE (Diagnosis-Related Estimates) Lumbosacral Category IV of the AMA *Guides* (4th ed.) because a fusion alters the motion segment integrity of the spine.

[12] Rawcliffe Depo. at 26.

Moreover, the doctor concluded claimant could work within his recommended work restrictions for her low back. The doctor believed claimant should not lift more than 20 pounds or more than 10 pounds occasionally. The doctor further recommended no repetitive lifting and no lifting from below knuckle height. In addition, the doctor restricted claimant from enforced and continuous, repetitive bending and twisting of the lower back. But the doctor permitted sitting if she could stand and stretch. Claimant could also walk short distances five to 10 minutes per hour. But standing and walking were restricted to 30 minutes at a time and totaling not more than three hours per eight-hour workday. Dr. Stein did not disagree, however, with Dr. Rawcliffe's opinion that claimant was unable to work as Dr. Stein only evaluated her low back.

20. Dr. Stein concluded claimant was not a good candidate for additional spinal surgery as he was concerned about her weight, smoking, symptom magnification, and the fact that a discogram was unable to identify which disc might be causing claimant's ongoing symptoms. In short, Dr. Stein concluded claimant had a very low pain threshold and that she was extremely sensitive to discomfort.

21. Respondent and its insurance carrier presented the September 2004 testimony of Chris Sexton, who is the facility manager of the store where claimant worked. Mr. Sexton testified the cashier's job that claimant was performing when she was terminated was within her medical restrictions as the weights did not exceed her restrictions. Moreover, he believed claimant could sit as necessary because of the light traffic during her night shift. Moreover, Mr. Sexton testified the greeter job that claimant had declined could be performed without violating Dr. Rawcliffe's restrictions.

CONCLUSIONS OF LAW

The Board concludes claimant's left upper extremity and low back injuries should be treated as one accidental injury rather than two separate accidents. The greater weight of the evidence is that claimant's symptoms worsened as she continued to work following her initial low back symptoms in May 1998 when she experienced what she believed was a left hip injury. But claimant continued to work and her low back and upper extremity symptoms progressed. By January 1999 both her left upper extremity and low back problems increased to the point that she stopped working for respondent. The Board concludes it is more probably true than not that claimant sustained simultaneous repetitive trauma to her left upper extremity and low back from May 1998 through January 28, 1999. Consequently, January 28, 1999, is designated as claimant's date of accident for the period of micro-traumas that she sustained while working for respondent unloading trucks and stocking shelves.

The Board affirms the Judge's finding that claimant sustained a 21 percent whole person functional impairment due to her left upper extremity and low back injuries. That rating was provided by Dr. Rawcliffe, whom the Judge selected to provide an unbiased opinion.

The Board recognizes that claimant's injuries have reduced her ability to work. But the doctors appear to agree that the low back injury, standing alone, would not prevent claimant from working as she could perform very light labor or sedentary work. The left upper extremity injury, however, further impedes claimant's ability to work.

Claimant was terminated from accommodated work in May 2002. The records introduced by respondent indicate claimant was counseled for, among other infractions, failing to show up for work and for failing to call and advise that she would be absent. Although some of claimant's attendance problems may be related to her work-related injuries, those injuries did not prevent claimant from calling respondent to advise that she was not coming to work. In short, claimant has failed to prove she made a good faith effort to retain her employment with respondent.

Moreover, in December 2003, respondent offered to accept claimant back to work and return her to a greeter's position that was further modified to meet claimant's restrictions. And again, in August 2005, respondent offered claimant an opportunity to return to work. Unfortunately, claimant did not accept respondent's offers.

The Board concludes this situation is controlled by the *Foulk*[13] and *Copeland*[14] decisions. In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than the actual wage being earned when the worker fails to make a good faith effort to find appropriate employment after recovering from the work injury.

[13] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[14] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[15]

The Kansas Court of Appeals in *Watson*[16] also held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker fails to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based on all the evidence, including expert testimony concerning the capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[17]

Claimant has failed to prove she made a good faith effort to retain her employment with respondent. In addition, it was not good faith for claimant to reject respondent's offers in December 2003 and August 2005 to return her to work. Respondent even invited claimant to visit with the store manager to discuss any specific concerns that she might have regarding the accommodated position. Instead, claimant summarily rejected the job offers and dismissed them as a sham.

The Board concludes respondent offered claimant a job within her permanent work restrictions. Consequently, the Board must impute a post-injury wage for purposes of the permanent partial general disability formula of K.S.A. 1998 Supp. 44-510e. And under these facts, the Board imputes the wages that claimant earned working for respondent.

The only issue before the Board regarding claimant's average weekly wage was whether claimant had established that respondent provided her with some insurance benefits that had been discontinued. Claimant satisfied that burden as she introduced copies of her pay stubs that indicate respondent was providing claimant with insurance benefits that cost $68.74 every two weeks. Accordingly, claimant's pre-injury average weekly wage is $289.79, which represents $273.20 per week in base wages, $0.42 per week in overtime wages, and $16.17 per week in shift differential. But after claimant was

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[15] *Id.* at 320.

[16] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[17] *Id.* at Syl. ¶ 4.

terminated in May 2002 and her insurance benefits were discontinued, claimant's average weekly wage increases by $34.37 to $324.16 per week.

For the period from January 29, 1999, through August 23, 1999, claimant was off work due to her injuries and left arm surgery. Accordingly, she is entitled to receive temporary total disability benefits for that period. The August 23, 1999, date was indicated in a November 8, 2005, letter to Judge Clark in which claimant's attorney set forth the dates that claimant received temporary total disability and temporary partial disability benefits.

For the periods from August 24, 1999, through March 29, 2000, and from July 20, 2000, through August 16, 2000, claimant worked for respondent performing accommodated work. Accordingly, for those weeks claimant is entitled to receive temporary partial disability benefits in the total sum of $2,940.06, as indicated in the letter to Judge Clark mentioned above.

For the period from March 30, 2000, through July 19, 2000, claimant is entitled to receive temporary total disability benefits as she was off work due to her low back surgery.

For the period commencing August 17, 2000, claimant returned to respondent and performed accommodated work. There is no evidence that claimant earned less than 90 percent of her pre-injury wage. Accordingly, claimant's permanent partial general disability benefits under K.S.A. 1998 Supp. 44-510e are limited to her 21 percent whole person functional impairment rating. Claimant worked through May 22, 2002, when she was terminated for absenteeism. But claimant's permanent partial general disability does not change as claimant failed to make a good faith effort to retain her employment with respondent.

An evidentiary issue arose during the litigation of this claim when respondent and its insurance carrier objected to claimant's offering into evidence a decision entered by the Social Security Administration in claimant's application for Social Security disability benefits. The Board sustains that objection as the decision by the Social Security Administration is hearsay. In addition, the decision is not relevant as to the extent of claimant's disability as defined by the Workers Compensation Act.

Claimant is entitled to receive unauthorized medical benefits up to the statutory limit of $500. Claimant's request for lifetime chiropractic treatment is denied. Future medical benefits, however, may be considered upon proper application to the Director.

AWARD

WHEREFORE, the Board modifies the November 29, 2005, Award entered by Judge Clark.

Gwendolyn M. Studyvin is granted compensation from Wal-Mart and its insurance carrier for a January 28, 1999, accident and resulting disability. Based upon an average weekly wage of $289.79, Ms. Studyvin is entitled to receive the following disability benefits:

For the periods from January 29, 1999, through August 23, 1999, and from March 30, 2000, through July 19, 2000, Ms. Studyvin is entitled to receive 45.57 weeks of temporary total disability benefits at $193.20 per week, or $8,804.12.

Ms. Studyvin is entitled to receive $2,940.06 in temporary partial disability benefits for the periods from August 24, 1999, through March 29, 2000, and from July 20, 2000, through August 16, 2000.

Commencing August 17, 2000, Ms. Studyvin is entitled to receive 77.53 weeks of permanent partial general disability benefits at $193.20 per week, or $14,978.80, for a 21 percent permanent partial general disability.

The total award is $26,722.98, which is all due and owing less any amounts previously paid.

Claimant is entitled to receive unauthorized medical benefits up to the statutory limit of $500.

Claimant's request for lifetime chiropractic treatment is denied.

Future medical benefits may be considered upon proper application to the Director.

The record does not contain a fee agreement between claimant and her attorney. K.S.A. 44-536 requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. Should claimant's counsel desire a fee be approved in this matter, he must submit his contract with claimant to the Judge for approval.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of May, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John S. Seeber, Attorney for Claimant
Kendall R. Cunningham, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director